

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

GIANNOTTA PROPERTIES, INC.,
Debtor.

Case No. 95-56961-JRG
Chapter 11

GIANNOTTA PROPERTIES, INC.,
Plaintiff,

Adversary No. 96-5046

vs.

MEMORANDUM DECISION

SAN JOSE NATIONAL BANK, et al.,
Defendants.

I. INTRODUCTION

In this action Giannotta Properties, Inc. seeks to set aside a foreclosure sale by which Barbaccia acquired title to a mobile home park in San Jose. Following discovery, the parties filed cross motions for summary judgment. The Court ruled orally on a number of issues. Four remaining issues were taken under submission and the Court's ruling on those issues is set forth in this memorandum. For the reasons hereafter stated the remainder of Giannotta Properties, Inc.'s motion is denied and the remainder of the Barbaccias' motion is granted in part and denied in part.

II. STATEMENT OF FACTS

The Giannotta family owned the La Buona Vita Mobile Home Park located in San Jose, California for more than 75 years. Around November 24, 1975, Carmella Giannotta and her brother John

1 Giannotta executed a 50-year ground lease in favor of the Barbaccia-Longwello partnership. Carmella
2 Giannotta and John Giannotta thereafter transferred their interest in the lease to Giannotta Properties,
3 Inc. ("GPI"), a corporation owned by the Giannotta family. When the Barbaccia-Longwello partnership
4 dissolved, the Barbaccias became the sole lessees.

5 A first deed of trust on the property is held by Farmers New World Life Insurance Company
6 securing a loan in the original amount of \$648,000, which is not delinquent. The individual partners of
7 the Longwello-Barbaccia partnership signed the Farmers' promissory note. The Giannottas did not sign
8 this note.

9 In 1992, GPI borrowed \$420,000 from E.F. Foley & Company, Inc. secured by a second deed
10 of trust on the property. GPI assigned a portion of its rent from the Barbaccia lease to make the loan
11 payments each month. This loan became all due and payable in February 1997 and remains in default.

12 GPI filed a Chapter 11 bankruptcy petition in July 1992. Approximately one year later, GPI
13 executed a promissory note in the amount of \$622,338 in favor of San Jose National Bank ("SJNB"),
14 exchanging a judgment held by SJNB for a third deed of trust against the property.

15 When GPI defaulted on the SJNB note on April 27, 1994, SJNB, through its trustee Bay Counties
16 Foreclosure Service ("Bay Counties"), recorded a notice of default. Thereafter, Bay Counties recorded
17 a Notice of Trustee's Sale, which set the sale date for August 1994. The foreclosure sale was continued
18 to January 15, 1995, however, when GPI made payments according to a stipulation between GPI and
19 SJNB.

20 The stipulation provided that GPI would pay to SJNB \$97,000 plus accruing interest and also
21 modified the underlying promissory note by extending the maturity date to December 30, 1994 and
22 setting the principal balance at \$622,338. GPI paid \$104,995.30 pursuant to the stipulation. At the time
23 of the foreclosure sale, GPI owed SJNB \$622,338 and perhaps interest on the note for December and
24 January.

25 GPI attempted to obtain financing from Imperial Thrift and Loan Association to pay the second
26 and third deeds of trust, replacing them with a new second deed of trust. By letter dated April 21, 1994,
27 Imperial Thrift indicated it had completed a review of GPI's loan request and was issuing a letter of
28 interest regarding a loan of \$1.3-1.4 million. The amount of the loan was later set at \$1.1 million, which

1 was believed enough to pay the secured creditors before dismissal of the case.

2 The Imperial Thrift loan committee approved the loan request on August 25, 1994. The
3 requirements of loan approval were threefold: that GPI obtain an appraisal of the property, an evaluation
4 for toxic issues, and court approval for dismissal of the case prior to or concurrently with the loan
5 funding. Estimated net proceeds of \$1,035,500 would be available to pay the Foley and SJNB liens.

6 On October 14, 1994 GPI obtained court approval for the loan. On October 31 the appraisal was
7 received, and the toxic report was expected on November 2. Documents were being drawn that and were
8 to be signed later that week, with the loan funding the following week. However, around November 1
9 additional requirements surfaced. Imperial Thrift required a collateral assignment of GPI's interest in the
10 ground lease, and a direct assignment of rents to Imperial Thrift. The testimony is unclear whether a
11 subordination agreement was required. Most importantly, Imperial Thrift required a signed estoppel
12 certificate from the Barbaccias.

13 Under §18.01 of the ground lease, the Barbaccias were required to provide GPI with an executed
14 estoppel certificate upon request. ("Landlord and Tenant shall at any time and upon not less than 10 days'
15 prior written request by either, execute, acknowledge and deliver in writing certifying that the Lease is
16 unmodified and in full force and effect, or if there are modifications, state the modifications, it being
17 intended that any such statement may be relied upon by a prospective purchaser of the fee or by a
18 prospective assignee of any interest taken in the Lease.")

19 Pasquale Giannotta ("Giannotta"), Carmella's son, who assumed responsibility for GPI's business
20 affairs, stated in his declaration that he telephoned Cyril Barbaccia to express the urgency of GPI's
21 situation and the need for the Barbaccias' cooperation. Giannotta memorialized their conversation in a
22 handwritten memo, recording that Barbaccia would "do whatever it took" to help. Barbaccia denied this
23 statement and instead declared that he referred Giannotta to the Barbaccias' lawyer. The Barbaccias
24 never signed the estoppel certificate. However, Barbaccia claims that he had offered to sign two forms
25 of an estoppel certificate, but never executed either because he never heard whether either form was
26 acceptable. Without explanation, the Barbaccias were unavailable to review the documentation between
27 January 12 and 16.

28 On January 12, 1995 Robert Rice, a loan officer at Imperial Thrift delivered the loan approval to

1 Giannotta, but reiterated that an estoppel certificate had not yet been received from Barbaccia and must
2 be signed before Imperial Thrift would fund the loan. In his deposition, Rice stated that Imperial Thrift
3 did not make the loan because the ground lessee, the Barbaccias, would not sign the tenant estoppel.
4 However, the original approval and the previously signed documents had expired and, at this point, the
5 loan committee needed to ratify the terms and conditions of the transaction before closing on a loan. At
6 this time, Giannotta was holding \$70,000 in cash which he could have used in closing the escrow, if
7 required.

8 SJNB's trustee's sale was scheduled for January 15, 1995. Since January 15 was a Sunday, and
9 the following day was a legal holiday, Bay Counties conducted the foreclosure sale on the next business
10 day which was Tuesday, January 17.

11 Bay Counties left a recorded message on its answering machine on Friday, January 13 advising
12 callers that the foreclosure sale would be held on January 17, 1995 at 9:00 a.m. According to Sharisse
13 Lanaux, the day-to-day manager of Bay Counties, she did not know how the postponements occurred
14 for this foreclosure sale. Richard and Deanna Joy, the former owners and operators of Bay Counties,
15 resigned their positions before January 13. The remaining employee trained to call out trustee's sales,
16 Maricella San Miguel, stated that she was in Idaho for the holiday weekend and had no recollection of
17 any postponements.

18 It was customary for Bay Counties to place a written record of each postponement in the
19 foreclosure file as required by California law. However, Bay Counties has lost its foreclosure file on the
20 property. Lanaux testified in deposition that she has no idea what happened to the file after the day after
21 the sale. It may be significant to note that there was no indemnity agreement between SJNB and Bay
22 Counties.

23 There were several contacts between the attorneys for GPI and the Barbaccias' attorney, Robert
24 Williams, during the last days before the foreclosure sale. Williams' file contains a handwritten note
25 dated January 13, 1995, indicating a telephone call from Kenneth J. Campeau, one of GPI's attorneys,
26 threatening a lawsuit. Thomas Casazza, another one of GPI's attorneys, telephoned Williams, on January
27 16. Williams wrote the following note to his file dated January 16: "Thinks the notice of sale is deficient
28 and that the sale won't go. Threatens lawsuit over assignments by Barbaccia." Williams testified in his

1 deposition that Casazza didn't specify how the notice was deficient. Barbaccia denied knowledge of
2 deficiencies in the notice or of GPI's intent to seek a restraining order.

3 At approximately 8:00 a.m. on January 17, 1995, Casazza, representing GPI, and Giannotta went
4 to Bay Counties' office. Casazza spoke with Larry Galusha, a loan agent who subleased space from Bay
5 Counties, requesting a postponement of the foreclosure sale until later that afternoon since they were
6 "meeting with a judge" that morning. Galusha called Deanna Joy, former co-owner and employee of Bay
7 Counties, who authorized Galusha to tell Casazza that the sale was postponed until 3:00 p.m. that day.
8 Galusha wrote this information on a business card and gave it to Casazza.

9 At approximately 8:55 a.m., Williams appeared for the Barbaccias at the location of the trustee's
10 sale. Williams purchased the property for the Barbaccias with cashier's checks totaling \$689,713.39.
11 There were no other bidders present. It is undisputed that the correct amount due under the SJNB note
12 was less than the amount bid. Fred Charpiot, an officer at SJNB, has stated that the sales price exceeded
13 the balance due SJNB by \$20,000 to \$25,000.

14 The value of GPI's fee interest subject to the ground lease was appraised at \$2,020,000 by
15 Imperial Thrift. Without the ground lease and without the mobile home park, the land was appraised at
16 \$5 million. The land and the mobile home park without the ground lease carried an appraised value in
17 excess of \$10 million. The Barbaccias took the property, subject to tax liens, the first deed of trust of
18 approximately \$457,000 and the second deed of trust.

19 The amount due to E.F. Foley on its note secured by the second deed of trust is disputed. At the
20 inception of the loan GPI assigned a portion of its rent from the Barbaccias to make the monthly loan
21 payments. At one point the Barbaccias assert that they paid interest on the note until it came due in
22 February 1997. At another point, the Barbaccias admit to not paying rent for three and one-half years.
23 The Barbaccias' calculations indicate the amount owing to Foley at the time was \$420,00 plus \$184,000
24 (12.5% interest for three and one-half years).

25 At 9:00 a.m. GPI's attorneys sought from the superior court a temporary restraining order to
26 enjoin the foreclosure sale. However, before the matter could be heard, the parties learned that the
27 foreclosure sale had already occurred.

28 The next day, January 18, 1995, GPI filed a complaint against the known participants in the Santa

1 Clara County Superior Court alleging fraud, deceit, and negligent misrepresentation. On the same day,
2 the trustee's deed was recorded with the Barbaccias as grantees. Pursuant to California Code of Civil
3 Procedure section 2924, the Trustee's Deed Upon Sale recites that

4 [a]ll requirements of law regarding the mailing of copies of notices or the publication
5 of a copy of the Notice of Default or the personal delivery of the copy of the Notice
6 of Default and the posting and publication of copies of the Notice of Sale have been
7 complied with.

8 The trustee's deed upon sale merged the fee simple and leasehold estates in the property.

9 After its first chapter 11 case was dismissed, on October 24, 1995, GPI filed this second voluntary
10 Chapter 11 case. SJNB removed the state court action to this court on January 18, 1996. GPI filed a
11 first amended complaint on December 20, 1996 naming SJNB, Cyril Barbaccia, individually and dba as
12 Barbaccia & Barbaccia Properties, Lena M. Barbaccia, Bay Counties Foreclosure Service, Diane Joy,
13 all persons unknown claiming any right, title or interest in the property, and does 1 through 100, alleging
14 claims of fraud and deceit, and seeking to set aside the foreclosure sale. Within the amended complaint,
15 GPI offered to tender all amounts due and owing to cure the claimed default and prayed that GPI be
16 reinstated to all of its former rights and privileges as owner of the property.

17 A stipulation between SJNB and GPI was filed on June 2, 1998, which resolved the dispute with
18 SJNB. The default of Bay Counties Foreclosure Services was taken on June 25, 1998. The only
19 remaining defendants are the Barbaccias and their agents.

20 **III. CONTENTIONS OF THE PARTIES**

21 The first issue for consideration is whether the postponements of the sale were made according
22 to the requirements of California Civil Code section 2924g(d). It is GPI's position that the foreclosure
23 sale should be set aside since there was no public declaration of the postponement. The Barbaccias' cross
24 motion asserts that GPI has failed to produce evidence to show there was not a proper public
25 postponement. The Barbaccias further claim that Bay Counties properly applied the procedures for
26 automatic postponement contained in California Civil Code section 11.

27 The second issue before the court is whether the Barbaccias are bona fide purchasers for value,
28 entitled to a conclusive presumption of the regularity of the sale. GPI points to the facts that the
Barbaccias never executed the estoppel certificate required by their lease and never told GPI of their

1 intent to bid at the foreclosure sale. The Barbaccias counter that they responded to GPI's demands for
2 an estoppel certificate as best they were able under confused circumstances, that they were entitled to
3 purchase the property under § 25.01 of the ground lease and that they had no responsibility for the
4 claimed defects in the foreclosure process.

5 The third issue for consideration is whether GPI can make a valid tender to set aside the
6 foreclosure sale. GPI argues that it had the ability to pay all indebtedness and the Barbaccias argue the
7 contrary. The parties dispute the total amounts owed. The Barbaccias claim a shortfall on the Imperial
8 Thrift loan of \$90,000. However, GPI disputes the calculations and asserts that the Barbaccias owe
9 \$437,500 in back rent as an offset. GPI also asserts that the foreclosure would not have occurred but
10 for the Barbaccias' conduct and that equity requires that the Barbaccias bear the expense of the post-
11 foreclosure defaults.

12 The final issue for consideration is whether the sale must be set aside because Galusha represented
13 to Casazza and Giannotta that the foreclosure sale would be postponed to 3:00 p.m. on January 17. The
14 Barbaccias dispute Galusha's statements as hearsay, unsupported by competent evidence and argue that
15 they should not be held responsible for Bay Counties' conduct. The Barbaccias also filed evidentiary
16 objections to GPI's evidence of the value of the property.

17 IV. DISCUSSION

18 A. Legal Standard

19 Summary judgment will be granted in favor of the moving party if there is no genuine issue as to
20 any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.
21 Substantive law will identify which facts are material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
22 248 (1986). Once the movant demonstrates from the record that there are no genuine issues of material
23 fact, the burden of proof shifts to the party opposing summary judgment to establish that questions of
24 fact exist. The court must view the evidence in a light most favorable to the nonmoving party. Id.

25 If the movant does not bear the burden of persuasion at trial, the movant's burden to show
26 presumptive entitlement to summary judgment is satisfied by pointing to the absence of factual support
27 for an essential element of plaintiff's claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986);
28 Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970). If movant makes this showing, the non movant

1 with the burden of persuasion must introduce specific facts showing a need for trial. The non moving
2 party need not produce evidence in a form that would be admissible at trial. See Celotex Corp. v. Catrett,
3 477 U.S. at 321-22. However, the non movant must satisfy the substantive evidentiary standard of proof
4 applicable to the merits of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 248-49.

5 **B. Evidence showing irregularity in the sale is absent.**

6 In its first cause of action, GPI alleges the irregularity of the foreclosure sale because of Bay
7 Counties' failure to give a public declaration of the postponement of the sale from Sunday, January 15
8 to Tuesday, January 17. GPI has alleged there was no postponement by public declaration and that the
9 sale should be set aside as a matter of law. Barbaccia's cross motion argues that GPI has failed to
10 produce evidence supporting its claim.

11 By statute, a public declaration of postponement is required. Any postponement and the reason
12 therefor is to be announced by the trustee at the time and place published in the notice of sale. Cal. Civ.
13 Code §2924g(d). There are no exceptions to this requirement. However, the Barbaccias make numerous
14 arguments that the foreclosure sale was procedurally proper.

15 First, the Barbaccias argue that there was an automatic postponement in accordance with
16 California Civil Code section 11, which provides:

17 When a secular act other than a work of necessity or mercy is appointed by law or
18 contract to be a day which is a holiday, this act may be performed on the next business
day.

19 Cal. Civ. Code §11. California Government Code section 6700 defines "holiday" to include every
20 Sunday and the third Monday in January (which in 1995 was January 16). However, California Civil
21 Code section 2924 does not make an exception to the requirement of a public declaration if the date falls
22 on a holiday. The requirement of a public declaration postponing a foreclosure sale is not eliminated.

23 The Barbaccias next argue that further notice is not required when a sale is continued following
24 the termination of the automatic stay. See Tully v. World Savings & Loan Assoc., 56 Cal. App. 4th 654,
25 661-64 (1997). However, the Barbaccias misread Tully. Tully determined that if the trustee follows the
26 procedure for oral postponements, no further notice of sale by publication, posting or mailing is required.
27 Id. at 664. A public declaration of postponement is still required.

28 Finally, the Barbaccias argue that there is no evidence to establish the postponement was

1 improper. There is no record of a postponement because the Bay Counties' file is lost.

2 GPI insists that the file was lost after its lawsuit commenced and after Bay Counties learned it did
3 not have an indemnity agreement with SJNB. GPI argues that an adverse presumption should be placed
4 on the Barbaccias because Bay Counties' file is lost.

5 Generally, a trier of fact may draw an adverse inference from the destruction of evidence relevant
6 to a case. See Akiona v. United States, 938 F.2d 158, 161 (9th Cir. 1991). This inference is based on
7 two rationales. The evidentiary rationale is that a party who has notice that a document is relevant to
8 litigation and who proceeds to destroy the document is more likely to have been threatened by the
9 document than is a party in the same position who does not destroy the document. The other rationale
10 has to do with prophylactic and punitive effects--allowing the trier of fact to draw the inference
11 presumably deters parties from destroying relevant evidence before it can be introduced at trial. Id. at
12 161 (quoting Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982)).
13 However, the Ninth Circuit also notes that neither rationale exists unless the party against whom the
14 presumption is applied had some notice that the document was potentially relevant. Id. In case law that
15 has allowed a presumption or adverse inference, the party against whom the inference or presumption
16 is asserted is the party that spoiled the evidence. No California case has held that it is appropriate to
17 impose a sanction adversely affecting a blameless party for third party destruction of evidence. Since in
18 this case it was not the Barbaccias who spoiled evidence but a party who has now defaulted and is not
19 a current party to the lawsuit, an adverse inference or shifting of the burden of proof is not appropriate.

20 It is GPI's position that there was no public declaration of postponement because the only two
21 individuals trained to call out trustee's sales were not working at the time. It is the Barbaccias' position
22 that there is no proof that Bay Counties did not publicly declare a postponement and the Barbaccias
23 assert that GPI cannot prove an essential element of its claim.

24 GPI cannot establish that a public declaration of postponement was not made. GPI bears the
25 burden of proof on this element of its claim. There is no authority to shift the burden of proof to the
26 defendant or to render an adverse inference. Since GPI cannot show that there was not a public
27 declaration of postponement, GPI cannot prevail on its summary judgment motion and GPI cannot prove
28 its case. Therefore, GPI's motion for summary judgment on this issue is denied and the Barbaccia's cross

1 motion for summary judgment on this issue is granted.

2 **C. Material facts are in dispute regarding the Barbaccias' claimed status as**
3 **bona fide purchasers. The Barbaccias are entitled to a rebuttable, but not**
4 **a conclusive presumption, under California Civil Code section 2924g(d).**

5 A trustee's deed upon sale that recites that all statutory notice requirements and procedures
6 required by law for the conduct of the foreclosure sale have been satisfied raises a rebuttable presumption
7 that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide
8 purchaser. Cal.Civ.Code § 2924; See also Homestead v. Darmiento, 230 Cal. App. 3d 424, 431 (1991).
9 The court has previously assessed that the recital contained in the deed upon sale in this case is broad
10 enough to have comprehended postponements of the sale.

11 To claim status as a bona fide purchaser, a party must show that it paid value, in good faith,
12 without actual or constructive notice of another's rights, see Oakdale Village Group v. Fong, 43 Cal.
13 App. 4th 539, 541 (1996), or the party must show that it paid value without any notice of any defects
14 in the seller's title, see Walters v. Calderon, 25 Cal. App. 3d 863, 866 (1972). See also Estate of Della
15 Yates v. West End Financial Corporation, 25 Cal. App. 4th 511 (1994). A person claiming bona fide
16 purchaser status generally has the burden of proof on this issue. See Gates Rubber Co. v. Ullman, 214
17 Cal. App. 3d 356, 358 (1989).

18 It is undisputed that the Barbaccias gave value by paying \$689,713.39 and assuming the senior
19 liens on the property. At issue is whether the Barbaccias purchased the property without notice of any
20 defect in the foreclosure process and in good faith.

21 The Barbaccias have shown they purchased the property without actual or constructive notice
22 of defects in the foreclosure sale. The court previously ruled that neither the incorrect street address
23 stated in the notice of trustee's sale nor the incorrect amount due stated on the note rendered the notice
24 invalid. GPI can produce no evidence of its claim that Bay Counties failed to publicly declare a
25 postponement. The Barbaccias deny that they learned anything from the lawyers that gave notice of any
26 defects in the foreclosure sale process.

27 The Barbaccias allege they purchased the property in good faith, as required by section 8302 of
28 the California Commercial Code. California Commercial Code section 1201(19) defines good faith as
"honesty in fact in the conduct or transaction concerned." In the traditional sense, good faith connotes

1 a moral quality, it is equated with honesty of purpose, freedom from fraudulent intent and faithfulness
2 to a duty or obligation. See Raub v. Casper, 51 Cal. App. 3d 866, 872 (1975).

3 In support of their position, the Barbaccias insist they had the right to purchase the property under
4 § 25.01 of the lease and provide deposition testimony and declarations that they offered to sign two forms
5 of an estoppel certificate for GPI in order to close the loan, but did not execute either form because the
6 Barbaccias were not advised that either form was acceptable. The Barbaccias allege they were strangers
7 to the financial transactions between GPI and San Jose National Bank and had no involvement with any
8 of the claimed defects in the foreclosure process.

9 However, GPI counters that the Barbaccias were unavailable to go over loan documents between
10 January 12 and January 16 and the Barbaccias provided no explanation for this. Furthermore, GPI points
11 to the fact that the Barbaccias never told GPI of their intent to bid at the foreclosure sale. These
12 allegations raise material, disputed issues that will require an evidentiary hearing for the court to evaluate
13 the witnesses. As a result, summary judgment is improper on the issue of whether the Barbaccias
14 purchased the property in good faith.

15 Although the Barbaccias are not entitled to bona fide purchaser status, and are therefore not
16 entitled to a conclusive presumption under California Civil Code section 2924, the Barbaccias are still
17 entitled to a rebuttable presumption of the regularity of the sale.

18 **D. Whether the sale is voidable requires determination of disputed**
19 **issues of material fact as to the amount of indebtedness owed by GPI**
20 **in order to effect tender.**

21 For GPI to set aside the foreclosure sale on the grounds that the sale is voidable, GPI must prove
22 it satisfies the elements of a valid tender. In order to cancel a voidable sale under a deed of trust, the
23 party must show a valid and viable tender of payment of the indebtedness owing. See Karlsen v.
American Savings and Loan Ass'n., 15 Cal. App. 3d 112, 116 (1971).

24 The elements of a valid tender are: 1) an offer must be made by the real party in interest, 2) that
25 must include no conditions which the beneficiary is not obligated to perform, 3) by an offeror with the
26 present ability to perform and pay all indebtedness due, and 4) be made in good faith by an offeror willing
27 to tender. Indebtedness due may include all principal, interest, taxes, assessments, insurance premiums,
28 or advances shown in the notice of default, all amounts in default on recurring obligations not shown in

1 the notice of default, and all reasonable costs and expenses which are actually incurred in enforcing the
2 terms of the deed of trust and trustee's or attorney's fees other than what would not have been due had
3 no default occurred. Cal. Civ. Code § 2924c.

4 An offer of performance is of no effect if the person making it is not able to perform. Cal. Civ.
5 Code § 1495. The offeror must be able, at the time of the offer of performance, to satisfy or make the
6 offer good. See McCarthy v. Grider, 72 Cal. App. 393, 402 (1925). The trustor must offer to pay all
7 sums necessary to cure the default. See Arnolds v. Eischen, 158 Cal. App. 3d 575, 580 (1984). There
8 is no need to have cash immediately available to make a valid tender. See Worcester v. Rosner, 811 F.2d
9 1224, 1231 (9th Cir. 1987). An offer is sufficient where GPI had sufficient convertible assets and the
10 ability to borrow.

11 Whether GPI had the ability to pay all indebtedness due at the time the offer was made is at issue.
12 Since the offer made in GPI's amended complaint relates back to the original complaint, the offer was
13 made on January 18, 1995. Therefore, GPI's ability to pay is viewed as of that date.

14 On January 18, GPI was in the process of getting a loan funded to pay off the indebtedness due.
15 Rice of Imperial Thrift stated that the renewed loan approval process could be completed in a matter of
16 days and the loan process would be complete pending the re-approval, re-signing of the documentation
17 and completion of any closing details and requirements. Imperial Thrift and their counsel expressed a
18 willingness to go to any prudent length necessary to effect this loan for GPI, including a review of
19 proposed changes to their documents requested by the Barbaccias.

20 The amount of indebtedness owing is a material fact in determining whether GPI made a valid
21 tender. GPI and the Barbaccias dispute the total amounts owed, and there are no receipts or canceled
22 checks to verify the actual amounts owed or paid. GPI alleges \$628,000 was due on the SJNB note and
23 \$420,000 was due on the Foley note. Points to Imperial Thrift and closing costs would total \$38,000.
24 Although GPI disputes owing fees of \$22,000 to its loan brokers or tax liens of less than \$5,000,
25 Giannotta had \$70,000 cash available to cover a shortfall. Under GPI's analysis, the net proceeds of
26 \$1,035,000 from the Imperial Thrift loan were sufficient to cover the indebtedness owed.

27 The Barbaccias allege the amount due SJNB was \$665,000, based on the amount actually paid
28 at the foreclosure sale less the overage of \$20,000 - 25,000. The Barbaccias also claim the amount due

1 on the Foley note was \$420,000 plus \$184,000 (12.5% interest for three and one-half years). If payments
2 had been made on the Foley note, those payments were assigned by GPI to Foley from the Barbaccias'
3 rent. However, the Barbaccias admit they had not paid rent to GPI for three and one-half years. If the
4 Barbaccias had not paid their rent for three and one-half years, no rent was assigned to Foley to pay the
5 interest on the note. As a consequence, the amount due would be \$420,000 plus \$183,750 in interest.

6
7 GPI argues that the Barbaccias' unpaid rent should be used to setoff the amounts due by GPIs.
8 In GPI's fourth cause of action of its amended complaint, GPI requests a setoff against any amounts
9 determined to be due to Cyril Barbaccia and Lena Barbaccia, based on rent due under the terms of the
10 Long Term Lease, demands an accounting of the books and records of the mobile home park to ascertain
11 the amount of any additional percentage rents due under the Long Term Lease, and further claims setoff
12 for any damages, costs and attorneys fees assessed against the Barbaccias. California law deems that a
13 claim and a counterclaim, whether liquidated or unliquidated, offset each other, and the amount of a
14 tender is reduced by the amount of the offset. See Hauger v. Gates, 42 Cal. 2d 752, 755 (1954).
15 Further, GPI argues that equity requires the parties responsible for illegal foreclosure to pay the default
16 portion of interest accruing on notes after sale. Since there are disputed material issues of fact, both the
17 Barbaccias' and GPI's motions for summary judgment are denied.

18
19 **E. The Court cannot determine whether the foreclosure sale**
20 **should be set aside based on Galusha's representation**
because value of the property is not supported by competent
evidence.

21 Finally, GPI argues that Galusha's representation to Casazza and Giannotta that the foreclosure
22 sale would be continued to 3:00 p.m. on January 17 was a misrepresentation of the time of the sale,
23 requiring that the foreclosure sale be set aside. A two-pronged test exists for setting aside a foreclosure
24 sale. A sale may be set aside where the property has been sold at a greatly inadequate price and one of
25 the following three things occurs: the owner of the property has been lulled into a false security, there
26 has been a slight irregularity, unfairness or fraud, or the owner of the property has been misled. Several
27 California cases illustrate these principles.

28 The case of Winbigler v. Sherman, 175 Cal. 270 (1917), is an example where the owner was lulled

1 into a false sense of security. The court determined that the price obtained at foreclosure sale was grossly
2 inadequate since the property was worth at least \$5,000, yet was purchased for \$500. A time had been
3 set for the foreclosure sale and publication had commenced a week before, yet the owner had no actual
4 notice of a time fixed for the sale and was told it would be commenced only in due course of time. This
5 statement was well calculated to lead the owner to believe no proceeding for a sale had yet begun and
6 lulled him into a false sense of security.

7 The case of Worcester v. Rosner, 811 F.2d 1224 (1987), provides an example where the court
8 found slight irregularity. The price was inadequate where defendant paid \$15,000 for property appraised
9 at \$240,000. Also, the notice of trustee's sale gave a different property description than the deed of trust,
10 including a 40-acre parcel in the description. The buyer was put on notice of the irregularity and should
11 have inquired about the description.

12 An example of unfairness or fraud is found in the case of Odell v. Cox, 151 Cal. 70 (1907).
13 There, the owner was misled where stock was sold for \$26.50 but had a cash value in the market of
14 \$2,000. The owner had no knowledge of any levy or proposed sale; the notice of the sale was posted
15 in a large city over 20 miles from the property and far removed from the neighborhood of the parties and
16 likely bidders. Undue advantage and unfairness were evident where the purchaser bid only a nominal sum
17 but had knowledge of the value of all the stock.

18 Central to this determination is whether the price paid was greatly inadequate in proportion to
19 the value of the property. Giannotta has submitted an appraisal prepared by Imperial Thrift that shows
20 a value of \$2,020,000 for the property subject to the Barbaccias' lease. The Barbaccias have objected
21 to the introduction of the appraisal as hearsay. There is no other competent evidence of the value of the
22 property for the court to evaluate. GPI has not met its burden of proof and the summary judgment motion
23 is denied on that basis.

24 V. CONCLUSION

25 GPI's summary judgment motion alleging an improper postponement is denied because there is
26 no evidence to support GPI's claim. Since the Barbaccias can establish an absence of evidence, the
27 Barbaccias' summary judgment motion on that issue is granted. There are disputed issues of material fact
28 as to whether the Barbaccias are bona fide purchasers, therefore summary judgment on that issue is

1 improper. Additionally, there are disputed issues of material fact concerning the amount of indebtedness
2 owed by GPI, therefore, the motion for summary judgment on the issue of whether GPI can make a valid
3 tender is denied. Finally, GPI's motion for summary judgment to set aside the sale based on Bay
4 Counties' misrepresentation is denied because GPI cannot show it would prevail on that claim as a matter
5 of law.

6 DATED: _____

7 JAMES R. GRUBE

8 UNITED STATES BANKRUPTCY JUDGE
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